



Office of Water Quality Wetland Water Quality Standards and 401 Certification Implementation Rulemaking

TOPIC PAPER: CREATION OF A STATE WETLAND PROGRAM IN THE WAKE OF SWANCC v. U.S. ARMY CORPS OF ENGINEERS

Purpose and Need for this Rulemaking:

On January 9th, 2001, the U.S. Supreme Court ruled against the U.S. Army Corps of Engineers and its authority to regulate certain isolated waterbodies (see Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers). While the Court's actual holding was narrowly limited to federal regulation of nonnavigable, isolated, intrastate waters based solely on the use of such waters by migratory birds, the Court's discussion was wider ranging. Some have interpreted the opinion as excluding from federal jurisdiction any isolated waterbodies that are not adjacent to waters of the United States. However, that interpretation is not consistent with the position taken in the joint memorandum issued by the U.S. EPA and the Corps on January 19, 2001.

The Supreme Court's decision removes certain water bodies from the jurisdiction of the U.S. Army Corps of Engineers. Generally, isolated waterbodies or wetlands that are not adjacent to waters of the United States may be affected by the SWANCC decision. Historically, Indiana has protected the state's waters, which include wetlands, by applying our water quality standards through the Department of Environmental Management's (IDEM) Section 401 Water Quality Certification program, in conjunction with the federal Section 404 U.S. Corps of Engineers permit program.

Due to the SWANCC decision, a Section 404 permit from the Corps of Engineers (and consequently a Section 401 state water quality certification) will not be required in those instances where a project might affect certain isolated water bodies that were formerly considered to be waters of the United States. However, the Supreme Court decision has no bearing on whether these water bodies are "waters" of the state subject to state law. Therefore, isolated water bodies will not cease to be waters of the state simply because they are no longer waters of the United States.

The Supreme Court decision did not question the states' authority to enforce their own statutes and regulations, and in fact, reaffirmed the states' primary authority to regulate its water resources and to control water pollution. IDEM is currently regulating all waters of the state, including those affected by the SWANCC decision, through application of existing state regulations (including the state's water quality standards).

IDEM is proposing to create a state wetland permitting program to cover water bodies and activities affected by recent federal court cases. IDEM believes that a permitting program can be established which will streamline the regulatory process, serve the public interest and clarify appropriate steps for the regulated community. This program would replace the recently established interim wetland NPDES permit and be complementary to the 401 water quality certification program.

Authority:

All waters of the state are subject to the water pollution control laws and regulations of the state of Indiana. These include, but are not limited to, water quality standards (which are set forth in 327 IAC 2) and the prohibition in 327 IAC 5-2-2 for discharging without a valid NPDES permit. Discharges of dredged or fill material to waters of the state, including wetlands, are likely to violate these provisions. The Water Pollution Control Board has broad authority under state law to adopt rules to prevent pollution and protect water quality. The establishment of a state wetland permitting program is consistent with this authority.

Proposed Revisions to the draft Section 401 Water Quality Certification Implementation Procedures to Create a State Wetland Regulatory Program:

Many states currently utilize dual wetland programs: a Section 401 Water Quality Certification Program for waters subject to federal jurisdiction and a state wetland regulatory program for waterbodies not covered by federal law. These programs do not add layers of regulation since their regulatory scope and authority cover different activities and/or types of waterbodies. Two states, Virginia and Tennessee, have dual programs that are most similar to the approach IDEM is initially advocating for this proposed rulemaking. In Virginia and Tennessee, a single review process was created, which is used to evaluate projects that need either a Section 401 Water Quality Certification or a state wetland permit. Public notice requirements, review criteria, mitigation requirements, and other relevant criteria are identical in each review.

For discussion purposes, IDEM proposes to modify the current draft 401 Water Quality Certification rule as follows:

- By inserting language creating a Surface Water Modification Permit Program.
- The need for this permit will only be triggered when a person proposes a project that will entail the placement of dredged or fill materials or excavation within waters of the state that are no longer considered waters of the United States.
- This permit will not be required for any project that is currently regulated by the Corps of Engineers under Section 404 of the Clean Water Act and IDEM's Section 401 Water Quality Certification.

Changes:

- This state permit program will regulate activities that may adversely affect water quality within all waters of the state that were previously but are not now considered waters of the United States under federal law.
- IDEM will, through this new program, regulate projects that would have been regulated by both IDEM and the Corps of Engineers under Sections 404 and 401 of the Clean Water Act before the SWANCC decision but no longer are.
- Major modifications to the rule would include revisions to the Purpose, Applicability, and Requirement sections of the draft Section 401 rule.
- IDEM contemplates the need to establish general permits for the Surface Water Modification Permit for minor activities. These general permits will parallel the existing regional general permits established by the Corps of Engineers.
- The proposed new program would have application, public notice procedures, administrative appeals and enforcement processes that are identical to the current proposed draft Section 401 procedures.

Implementation:

As IDEM has regulated these fills and waterbodies in this manner throughout the history of the 401 Program, IDEM anticipates that this permitting program can be implemented immediately upon adoption of the rule and will not have a measurable financial impact on the regulated community.